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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 849

JACOB SPEVAK, DOING BUSINESS AS J. SPEVAK AND COMPANY, AND GEORGE LERIAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 45–51) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 6, 1946 (R. 51). The petition for a writ of certiorari was filed January 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, in the circumstances of the case, petitioners were deprived of their constitutional right to representation by counsel through the trial court's refusal further to continue the trial to enable petitioners to retain trial counsel.

STATEMENT

On April 7, 1945, petitioners were indicted in the United States District Court for the District of Maryland in a multiple count indictment alleging numerous sales of meat at prices in excess of ceiling prices, in violation of the Emergency Price Control Act of 1942, as amended, 50 U. S. C. App., Supp. V, 901, *et seq.* (R. 36).[1] They were brought into court on November 13, 1945, for arraignment, at which time they were represented by Mr. Albert Smalholtz. No plea was entered on that date, and the defendants were given until November 30 to file preliminary motions and to obtain trial counsel. No motions were filed. Shortly before November 30, Mr. Smalholtz withdrew from the case and Mr. William E. Leahy advised the United States Attorney that he had been consulted by petitioners and that he desired that petitioners' cases be continued until he com-

[1] A second indictment was returned at the same time charging petitioner Spevak and others with conspiring to transfer meat at wholesale at over the ceiling prices, and Spevak was convicted at an earlier trial on one count involving a transaction unconnected with this case (R. 36, 39).

pleted the trial of a case in which he was then participating. The United States Attorney brought the request for a continuance to the attention of Judge Coleman and it was granted. The matter was further delayed from time to time to permit Mr. Leahy to complete other business. (R. 36–37.)

After the case had been delayed from November through May 1946, the United States Attorney "decided that it was time to bring the case to a head; and, in order to shorten the trial, we prepared a new criminal information" which contained 40 counts selected from the indictment returned in April 1945. This information was filed May 31, 1946. (R. 37.) The United States Attorney forwarded a copy of the information to petitioners and informed them in writing to appear for arraignment and trial on June 10, 1946; the clerk of the court also gave them a similar notice (R. 37).

Nothing was heard from petitioners until June 5, when Mr. Leahy requested the United States Attorney to agree to a further continuance. Mr. Leahy was advised that the Government would not consent to a further continuance and he thereupon withdrew from the case (R. 37). On the following day, June 6, a Mr. Norman Bowles, Jr., one of petitioners' present counsel, approached the United States Attorney with respect to securing a further continuance to

enable petitioners to retain trial counsel. Mr. Bowles stated that he could not try the case because of other professional commitments. On June 8, 1946, Judge Coleman granted Mr. Bowles' request for a continuance until June 18, 1946. The Assistant United States Attorney promptly informed petitioner Lerian, who was at petitioner Spevak's place of business, that the case had been continued until June 18; he was unable to contact petitioner Spevak. (R. 37–38, 35, 3.)

The United States Attorney heard nothing further from the petitioners until late Friday afternoon, June 14, when petitioners in proper person filed a motion to dismiss and a petition to stay the proceedings to permit them to resort to the Emergency Court of Appeals. On June 15 or 16 a Mr. Edward Schaub informed the Assistant United States Attorney that he had been employed by petitioners as local counsel, but not to try the case. On the morning of June 17, one day prior to the trial date, a Mr. Abraham Glasser entered the case solely for the purpose of handling the petition for a stay of proceedings to enable petitioners to resort to the Emergency Court of Appeals. Mr. Glasser and the Assistant United States Attorney consulted with Judge Coleman in chambers on the afternoon of June 17 and he granted Mr. Glasser leave to present argument in support of his application for a stay in open court on the following day when the case was

called for trial. At the same time petitioners were told that if their motion for a stay was denied, the case would go to trial on June 18. (R. 38, 4, 5.)

On June 18, petitioners were arraigned and entered pleas of not guilty (Tr. 43, 50[2]). The motion to dismiss previously filed by petitioners in proper person was withdrawn and Mr. Glasser argued for a stay of the criminal proceeding and for leave to attack the regulation involved in the Emergency Court of Appeals (R. 40). The stay was denied and a jury was then selected, Messrs. Glasser and Schaub participating (Tr. 107–108). After the jury was sworn the case was continued until the following day (Tr. 108).

On the following day, immediately after the court was convened, it was adjourned for one hour (Tr. 110). When court reconvened petitioners went to trial without counsel (Tr. 109).

At the opening of the trial the court made the following statement (R. 5–6):

> The Court desires to make the following announcement for the benefit of the jury, the Government, and the defendants.
>
> The defendants have had counsel from time to time, but, for various reasons, counsel have withdrawn from the case.

[2] The reference Tr. is to the stenographic transcript of record certified by the clerk of the court below. The printed record consists of the appendices to the briefs filed in the circuit court of appeals and the proceedings in that court.

They may have had good reason. The defendants have been put under an Order to obtain additional counsel, or new counsel, from time to time, but they have not complied with the Court's Order. Yesterday the defendants, therefore, were instructed that if the motion made on their behalf to stay the proceedings pending their going to the Emergency Court of Appeals was denied, they would have to go to trial today, with or without counsel. In other words, the Court felt that they had had due notice the last six months or more with respect to their obligation as to having counsel on hand at the appropriate time.

The Court now is informed that they do not have counsel, according to those Orders; so the Court is requiring them to proceed with the trial now; and if they do not have counsel, they will have to appear in their proper person representing themselves. The law gives every man the right to try his own case, if he wants to, without counsel. It is done frequently.

In the present case the Court has given to these defendants more than the full time over a period of months to have whatever counsel they may desire. There has been no intimation that they are not able to pay for counsel. Where one subject to indictment is faced with trial, if he satisfies the Court that he does not have funds adequate to employ counsel, the Court is authorized to assign counsel to him, and

> does that. That is done quite frequently in this Court. This is not such a case. Therefore, under the circumstance, since the case has been assigned for trial several times, and the Court has been, as it feels, unusually liberal on the point, to the point of undue liberality, as compared with other defendants who are called up for trial, the Court feels that the case must now proceed to trial.
>
> The defendants have a right to stand on their plea of not guilty; and the burden of proving their guilt rests upon the Government, full instructions as to which the Court will give in due course to you, gentlemen of the jury.
>
> In making this announcement the Court is in no sense appearing to pass upon the guilt or innocence of the defendants, but it is merely to explain the obligations they are under to not further delay the trial.

The trial judge then explained the procedure to the petitioners (R. 5–8) and the trial proceeded. Petitioner Spevak made an opening statement to the jury (Tr. 178) and petitioners called witnesses in their defense (Tr. 189, 192). At the conclusion of the case the Government abandoned five counts of the information. The jury found petitioners not guilty on four counts and guilty on the remaining thirty-one. (R. 2.) Petitioners were sentenced to imprisonment for twenty days on each count, the sentences to be served consecutively, and in addition petitioner Spevak was fined a

total of $6,200 and petitioner Lerian $3,100 (R. 2–3).

Immediately after the sentences were imposed Mr. Glasser reentered his appearance in the case for the purpose of applying for bail and taking an appeal (Tr. 225). Separate applications for bail to the trial judge, Circuit Judges Dobie and Soper, and Chief Justice Vinson were denied (see Tr. 226, 230–231). On the appeal to the Circuit Court of Appeals for the Fourth Circuit, the convictions were affirmed (R. 51).

ARGUMENT

Petitioners' sole contention in this Court is that they were denied the right to representation by counsel of their own selection, because after continuances had been had the trial court refused to continue the case again to permit them to retain trial counsel. The trial court assigned as its reasons for refusing further to continue the case the facts that petitioners had had many months in which to secure trial counsel, that they had the benefit of the services of numerous counsel who had participated in the case prior to trial and that the court was convinced that petitioners "have been trifling with the court" (Tr. 62). After examining the record, the circuit court of appeals unqualifiedly concurred in the trial court's conclusions (R. 45–47).

This is not a case in which defendants who were ignorant of their legal rights were forced to go to

trial without benefit of counsel. As the court below pointed out (R. 46), petitioners admittedly spent $20,000 for legal services in connection with the present case. They were represented by counsel through the selection of the jury and counsel again entered the case immediately after judgment was entered. Thus, the sole basis of their claim is that the case was not continued long enough to permit them to obtain the trial counsel that they preferred. We agree with petitioners that they were entitled to an opportunity to secure trial counsel of their own selection, but the Sixth Amendment does not entitle them to insist on continuance after continuance merely because the counsel of their selection is a busy lawyer whose services are in demand.

Assuming that petitioners were sincere in their efforts to delay the trial of the case—an assumption which is hardly warranted—their position was stated by Mr. Glasser, one of their counsel, at the June 17, 1946, hearing before Judge Coleman. He explained to the court that Mr. Smalholtz, petitioners' first counsel, withdrew from the case in November 1945, because petitioners determined to secure "distinguished trial counsel," namely, Mr. Leahy (Tr. 60). From the end of November 1945, through most of May 1946, the prosecution was delayed while Mr. Leahy was engaged in other litigation. Finally, when further delay became intolerable, the Government undertook to

simplify the case by substituting an information containing only some of the counts in the earlier indictment, and petitioners were notified that arraignment and trial was set for June 10, 1946. On June 5, the Government refused to consent to Mr. Leahy's request for a further continuance and he thereupon withdrew from the case. On the following day Mr. Bowles, another of petitioners' counsel, reiterated to the Assistant United States Attorney (see R. 37) that Mr. Leahy "could not try the case," and as a result on June 8 he obtained a continuance until June 18. There is no contention that these facts were not personally known to petitioners.

Thus, viewing the case in the light most favorable to petitioners, on June 8 they knew that Mr. Leahy was not available to try their case, and that their trial had been delayed until June 18 to enable them to secure new trial counsel. In the days that followed Messrs. Glasser and Schaub joined petitioners' corps of attorneys, but not for the purpose of trying the case. Petitioners had a minimum of ten days in which to secure trial counsel for a case which Mr. Leahy avers he could have prepared for trial in two or three days if he were pressed for time (R. 29). As the court below said (R. 48), it cannot be seriously urged that petitioners could not find a competent trial lawyer in Baltimore to represent them at their trial on June 18. Moreover, they

had an abundance of legal talent at their disposal, which they preferred not to use at the trial of their case. As we have said, their lawyers represented them through the selection of the jury and they reentered the case just as soon as the judgment was entered. As early as June 14, four days before the trial, petitioners filed motions in the trial court in proper person—motions which, it is a fair inference, were prepared by persons familiar with the law (R. 38). In these circumstances, we think it plain that petitioners had ample opportunity to secure trial counsel and that their reluctance to have their retained counsel try the case hardly justifies their present claim that they were denied representation by counsel.

In view of these facts and the conclusion of the trial judge that petitioners were "trifling" with the court, there can be no serious doubt that it was not an abuse of discretion not to further continue the trial after June 18, 1946. Cf. *Avery* v. *Alabama,* 308 U. S. 444; *Neufield* v. *United States,* 118 F. 2d 375, 380–384 (App. D. C.), certiorari denied *sub nom. Ruben* v. *United States,* 315 U. S. 798. *United States* v. *Bergamo,* 154 F. 2d 31 (C. C. A. 3), upon which petitioners rely, involved the refusal of a trial court to permit nonresident counsel selected by the defendant to try the case and thus presented quite a different situation from that involved in this case.

CONCLUSION

Petitioners had more than six months in which to prepare for trial. Admittedly they were financially able to retain counsel of their own selection. They had several attorneys representing them at various stages of the case. Their failure to have trial counsel is attributable only to their lack of diligence or to their strategy. In the circumstances shown by the record, the prosecuting attorney and the trial judge would have been remiss in the performance of their duties if they had permitted petitioners to further forestall the trial. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

JANUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947